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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MICHIGAN,
Petitioner

vs.

RAYMOND GALLAGHER,
Respondent

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE MICHIGAN COURT OF APPEALS AFFIRMATIVELY MISAPPLY CONTROLLING CASE LAW PRECEDENT RELATING TO THE GRANT OF A NEW TRIAL ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF AN ALLEGED CONFLICT OF INTEREST WHERE SAID COURT UPHELD A GRANT OF NEW TRIAL AFTER FINDING ONLY A POTENTIAL AND NOT AN ACTUAL CONFLICT OF INTEREST.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF MICHIGAN

NOW COMES William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by EDWARD REILLY WILSON, Deputy Chief, Civil and Appeals, and A. GEORGE BEST II, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above entitled cause on 19 May 1982.

A timely application for rehearing before said Court was made and denied on 6 July 1982. A timely application for leave to appeal was made to the Michigan Supreme Court and that court denied the petitioner any relief on 18 October 1982.

OPINIONS BELOW

On 19 May 1982 the Michigan Court of Appeals upheld a grant of new trial to this defendant on one of the two grounds enunciated by the trial court (the Court of Appeals found one ground to represent an abuse of discretion.) That opinion is appended hereto as Appendix A. A timely application for rehearing was made by petitioner and no relief was granted 6 July 1982. Appendix B. A timely application for leave to appeal was filed by petitioner in the Michigan Supreme Court, that Court denied any relief by order dated 18 October 1982. Appendix C.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued 19 May 1982. The order of that Court denying an application for rehearing was issued on 6 July 1982. The order of the Michigan Supreme Court denying application for leave to appeal was issued on 18 October 1982. The jurisdiction of this Honorable Court is invoked under 28 USC 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Defendant and a co-defendant were each charged in a two count information with first degree murder (MCL 750.316) and conspiracy to commit first degree murder (MCL 750.316, 750.157A). Each was represented by their own counsel.

Defendant was tried by jury and, in conjunction with a co-defendant, was convicted as charged. Defendant was sentenced to the legislatively mandated term of life imprisonment as to both counts in November 1979.

Defendant's trial counsel filed a motion for new trial. Defendant then retained new counsel who added several issues to the new trial motion, one being a claim that defendant had been denied the effective assistance of trial counsel due to an alleged conflict of interest springing from trial counsels earlier representation of another individual who was not a defendant in the present case.

Extensive hearings were held, and a new trial was granted in June 1980, the trial court finding that a conflict did exist. Appellate proceedings were brought by the People and a remand was ordered by the State Court of Appeals to take additional testimony. A new hearing was held at the conclusion of which the trial court again granted defendant a new trial, this time on two grounds; first, a conflict of interest denying effective assistance of trial counsel and, second, a "cumulation" of individually non-reversible trial errors which equalled a "miscarriage of justice". New trial grant was again given in October 1980.

The new trial hearings revealed that defendant's trial counsel had several years earlier represented an individual who was not a defendant here, in a federal narcotics case. That individual was now alleged by defendants new appellate counsel to be an "alternate suspect" to the crimes of which this defendant was convicted.

Police testimony indicated that at no time had they ever uncovered any evidence or "leads" pointing to this "alternate

suspect" as having had any involvement in the crimes charged agains: this defendant.

Testimony from trial counsel's private investigator indicated that even after some 400 hours of research and witness interviews, he had discovered no "links" between the crimes charged and the "alternate suspect" (9 July: 16, 29, 39; 24 Sept: 9-12, 17-18, 20-21; 24, 56)

Trial counsel testified that there was no conflict of interest, that he never had or obtained any evidence or information alluding to a "live" "alternate suspect"; that he never suppressed any such information and that he did not structure his presentation of the case or his preparation of it in such a manner as to shield this "alternate suspect". (24 Sept: 68-71, 74-75, 92, 132-136; 25 Sept: 85-88, 99-101, 113-114)

The "alternate suspect" testified that he had no involvement in the charged crimes and that he had had no contact with the defendant's trial counsel immediately prior to or during the trial of defendant. (28 Sept: 132-166)

The People sought leave to appeal such order, leave being granted by the State Court of Appeals. That court found an abuse of discretion by the trial court in holding that cumulative errors justified a new trial. That court noted that, "in fact, there has been absolutely no showing of trial error. We conclude, therefore, that the trial judge abused his discretion in granting a new trial and upon a miscarriage of justice." **People v Gallagher**, 116 Mich App 283, 299 (1982)

The Michigan Court of Appeals did however decide that the trial court had not abused its discretion in granting a new trial on the basis of ineffective counsel because,

> " ... the record does support a finding that defense counsel's former representation of an alternate suspect in this case "may" have inhibited counsel's directives concerning the investigatory process, which, in turn, "may" have

> affected counsels examination and cross-examination of witnesses and the manner in which the trial was conducted.
>
> * * *
>
> ... it is unclear whether defendant was ever informed of the potential conflict of interest ...

People v Gallagher, supra, 294.

The Court of Appeals concluded that,

> On the record, we are convinced that the trial court was correct in finding that a conflict of interest "may" have prejudiced the defendant's trial and that no valid waiver had occurred. **Gallagher, supra,** 295.

The Court of Appeals thus found only that a "potential" conflict of interest "may" have existed during defendant's trial.

A timely application for rehearing was denied by that court. The Michigan Supreme Court also denied the People any relief upon their review of the People's Application for Leave to Appeal.

REASONS FOR GRANTING THE WRIT

THE MICHIGAN COURT OF APPEALS AFFIRMATIVELY MISAPPLIED CONTROLLING CASE LAW PRECEDENT RELATING TO THE GRANT OF A NEW TRIAL ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF AN ALLEGED CONFLICT OF INTEREST WHERE SAID COURT UPHELD A NEW TRIAL AFTER HAVING FOUND ONLY A POTENTIAL AND NOT AN ACTUAL CONFLICT OF INTEREST.

The Michigan Court of Appeals was squarely presented with the question of whether there had been ineffective assistance of trial counsel based on an alleged conflict of interest springing from the years-prior representation by that counsel of an individual alleged (after trial) to be an "alternate suspect" in the crimes charged against defendant. The Michigan Court of Appeals reviewed the trial and post-trial record and upheld the new trial grant of the trial court. The People allege that that action was taken in total disregard of controlling United States Supreme Court precedents.

The basic question was whether defendant's Sixth Amendment rights were violated. The Sixth Amendment is applicable to the states via the Fourteenth Amendment. **Gideon v Wainwright**, 372 US 335, 9 L Ed 2d 799 (1963). Here, the Court of Appeals dealing with the Sixth Amendment, totally disregarded **Cuyler v Sullivan, 446 US 335, 64 L Ed 2d 333 (1980).**

The Court of Appeals in its opinion noted that,

> ... **record does support a finding that defense counsel's former representation of an alternate suspect in this case "may have inhibited counsel's directives** concerning the investigatory process which, in turn, **"may" have affected counsel's examination and cross-examination** of witnesses and the manner in which the trial was conducted.

> The most troublesome aspect of this case is that it is unclear whether defendant was ever informed of **the potential conflict of interest** and risks pursuant thereto and whether the defendant had consented to counsel's representation when and if such disclosure was made.
>
> On this record, we are convinced that the trial court was correct in finding that **a conflict of interest "may" have prejudiced the defendant's trial** and that no valid waiver had occurred.

People v Gallagher, 116 Mich App 283, 294-295 (1982) (emphasis added).

The correct standard as been succinctly and cogently set forth by the United States Supreme Court in **Cuyler v Sullivan, supra.**

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that **an actual conflict of interest** adversely affected his lawyer's performance.
>
> • • •
>
> ... until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.
>
> • • •
>
> We hold that **the possibility of conflict is insufficient to impugn a criminal conviction.** In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that **an actual conflict of interest** adversely affected his lawyer's performance. (346, 347, 348) (emphasis added).

This standard, one which requires the showing of an **actual,** presently extant, conflict of interest and not merely a "potential conflict" would mandate the reversal of the opinion of the Court of Appeals **and** of the trial court below.

What is readily apparent from a reading of the Court of Appeals decision is that it did **not** accept any trial court finding of an "actual conflict of interest." The very language utilized shows beyond peradventure that had the Court of Appeals utilized **Cuyler, supra,** they would have **reversed** the trial court and not affirmed it.

As noted in **United States** v **Zatjac**, 677 F 2d 61, 63 (CA 11, 1982),

> For a conflict of interest to cause ineffective assistance of counsel the conflict must be actual, not merely hypothetical or speculative. **Cuyler** v **Sullian**, (cite omitted); **United States** v **Fox**, F2d 99, 102 (CAS, 1980)

This principle has also been expressed with unmistakable clarity in numerous other cases; **United States** v **Martinez**, 630 F2d 361 (CA 5, 1980); **United States** v **Agosto**, 675 F2d 965, 970 (CA 8, 1982); **United States** v **Valenzuela**, 521 F2d 414, 416 (CA 8, 1975); cert den, 47 L Ed 2d 321 (1976); **Bailey** v **Redman**, 657 F 2d 21 (CA 3-1981); **Camera** v **Fogg**, 658 F 2d 80 (CA 2-1981); **Baty** v **Balkcom**, 661 F 2d 391 (CA 5-1981); **Dently** v **Lane**, 665 F 2d 113 (CA 7-1981); **Alexander** v **Housewright**, 667 F 2d 556 (CA 8-1981); **Daneils** v **Maggio**, 669 F 2d 1075 (CA 5-1982); **Davis** v **Franzen**, 671 F 2d 1056 (CA 7-1982)

The Sixth Circuit has recently expounded its view on this question and has reached an identical result.

> ... The **Cuyler** test directs us to determine, on the facts of each case, whether there is an actual conflict of interest and whether that conflict has caused ineffective performance in violation of the

> processes of the Sixth Amendment made applicable to state proceedings by the Due Process Clause of the Fourteenth Amendment.
>
> • • •
>
> Appellants have not adduced evidence that counsel "actively represented conflicting interests" and the District Court's finding that there was no conflict of interest in this case is not clearly erroneous. The **Cuyler** court states that until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

Smith v **Bordenkircher**, 671 F2d 986, (CA 6, 1982); **United States** v **Knight**, 680 F 2d 470 (CA 6-1982).

It is thus clear that the Court of Appeals here reversibly erred. It is also clear that a review of its decision shows that it found no actual conflict of interest thus requiring it to reverse the trial court below and set aside the grant of new trial.

The above was noted by the one Judge who dissented in **Gallagher, supra.**

> I respectfully dissent. Although the majority accepts the trial court's determination that a conflict of interest existed and focuses its attention on whether the conflict affected counsel's performance, I find no basis for concluding that a conflict was established.
>
> In order to establish ineffective assistance of counsel, defendant must demonstrate an actual conflict of interest which adversely affects his lawyer's performance. He must show that his counsel actively represented conflicting interests. **Cuyler** v **Sullivan**, 446 US 335; 100 S. Ct 1708; 64 L Ed 2d 333 (1980). The trial court was of the opinion that a conflict existed because counsel had

represented Mr. X on a prior occasion and because of an alleged personal relationship between the two. I find neither to be supported by the evidence.

* * *

Any conclusion that counsel actively represented conflicting interests because of this prior attorney-client relationship is based upon speculation and conjecture only, not upon the evidence. Counsel was not serving two masters. See **Olshen** v **McMann**, 378 F2d 993 (CA 2, 1967), **United States ex rel Kachinsky** v **Cavell**, 453 F2d 581 (CA 3, 1971) (counsel formerly represented a prosecution witness).

Counsel did not have two clients to whom he owed his undivided loyalty. He was not confronted with a situation where his efforts to protect the interests of one client would cause him to sacrifice the interests of the other client which he was also ethically obligated to protect. No actual conflict of interest existed because of counsel's former representation of Mr. X.

The trial court was also of the opinion that because of a continuing personal relationship between counsel and Mr. X, counsel sought to protect Mr. X at defendant's expense. I do not believe that the evidence justifies such a determination.

(299-301)

The Court of Appeals decision was also in conflict with prior Michigan authorities (which implicitly follow Cuyler supra)

In People v Green, 96 Mich App 104 (1980), the following situation obtained:

> At the preliminary examination, appointed counsel indicated to the court that he had represented the key prosecution witness in the past and that another member of his firm was presently representing the witness on a pending charge. Counsel stated that he had discussed the matter with the defendant, who had no objection to counsel conducting the preliminary examination. Counsel further stated that if the defendant were bound over for trial, he would withdraw as defendant's attorney. The examination commenced, and resulted in the defendant being bound over. Counsel promptly moved to and did withdraw.
>
> Defendant argues first that representation of a defendant and a key prosecution witness amounts to ineffective assistance of counsel per se. We decline to apply a per se rule under the facts of the present case. See **People** v **Van Brocklin**, 76 Mich App 427, 430; 257 NW2d 107 (1977). The facts underlying this declination are that counsel was not presently representing the witness, that the representation of the defendant took place at the preliminary examination and that defendant consented to such representation after having discussed the matter with counsel. We hold that absent some showing of prejudice arising from the conflict of interest, the defendant was not denied effective assistance of counsel. We further hold that no such prejudice was extant here. (107-108).

In that case, there existed an **actual** conflict of interest — one which was acknowledged by defense counsel and by the trial court. That **actual** conflict did not however prejudice the defendant in any degree. Defendant's conviction was affirmed.

In **People** v **Villarreal**, 100 Mich App 379 (1980), the court held that:

In order for ineffective assistance of counsel to result from shared counsel by co-defendants, there must be a showing of actual prejudice:

> "Specifically, a defendant is entitled to 'the undivided loyalty of his counsel'. **People** v **Gardner**, 385 Mich 392, 400; 189 NW2d 229, 234 (1971).
>
> "Where counsel have represented co-defendants, we have required a showing of actual prejudice before finding reversal warranted. **People** v **Jones**, 64 Mich App 659, 667-668; 236 NW2d 531, 536 (1975), **People** v **Marshall**, 53 Mich App 181, 189-190; 218 NW2d 847, 852 (1974); **People** v **Hilton**, 26 Mich App 274, 276; 182 NW 2d 29, 30 (1970). **This is because such relationships do not inevitably involve conflicts of interests. People** v **Hilton, Supra.**" **People** v **Van Brocklin**, 76 Mich App 427, 430; 257 NW2d 107 (1977).
>
> See also **Holloway** v **Arkansas**, 435 US 475, 482; 98 S. Ct 1173; 55 L Ed 2d 426 (1978). (389-390) (emphasis added).

Again, an **actual conflict** of interest was affirmatively found to exist.

In **People** v **Mendez**, 101 Mich App 735 (1980), the court held that,

> Defendant first argues that he was deprived of effective assistance of counsel by the joint representation of all of the defendants by retained counsel. At the insistence of the prosecutor several purported waivers were made by the defendants of any claim of conflict arising out of the multiple representation. The dispute over the validity of these waivers need not be addressed by this court with regard to defendant Mendez because a review of the transcript in this case indicates that defendant Mendez was not prejudiced

> by the multiple representation of himself and his codefendants by retained counsel.
>
> In order for ineffective assistance of counsel to result from shared counsel by codefendants there must be a showing of actual prejudice. **People** v **Van Brocklin**, 76 Mich App 427; 257 NW2d 107 (1977) (736-737) (emphasis added).

Again, actual prejudice springing from an **actual** conflict of interest must exist prior to any relief being granted.

In **People** v **Aquilar**, 105 Mich App 258 (1981), the defendant argued that there existed a conflict of interest from joint representation. After a full review no such **actual** conflict was found, the conviction was affirmed.

In **People** v **Clark**, 106 Mich App 771 (1981), the court held:

> Joint representation of defendants, however, does not always lead to a conflict of interest of such magnitude as to warrant reversal. Where an attorney has represented two or more codefendants at one trial, **this Court has required a showing of actual prejudice as a prerequisite for finding reversible error. People** v **Jones**, 64 Mich App 659; 236 Nw2d 531 (1975), **People** v **Hilton**, 26 Mich App 274; 182 NW2d 29 (1970) (emphasis added).

In **People** v **Bentley**, 402 Mich 121 (1978) the Supreme Court of Michigan stated,

> The Defendant-Appellant's ... trial attorney also represented a co-defendant with conflicting interest. (122).

The Supreme Court **did not find** that the trial counsel "may" have had conflicting considerations or that there was a "possibility" of a conflict of interest. They specifically and

directly and expressly found an **actual**, presently extant conflict which, having been found to exist, did "result in at least some prejudice to Bentley" (123). **Bentley** itself is thus authority for a result which is directly opposite to that reached by the Court of Appeals in this instant case. (The clear import of **Bentley** was again recognized, and reaffirmed, in **People** v **Gardner, 406 Mich 369 (1979).**

CONCLUSION

Inasmuch as the Michigan Courts recognize that "in matter of Federal constitutional interpretation our fealty is to the United States Supreme Court", the People request that this Honorable Court direct compliance with its binding precedents. **People** v **Hoffman**, 81 Mich App 288, 298 (1978); **People** v **Drielick**, 400 Mich 559, 567 (1977)

WHEREFORE the People respectfully request that this Honorable Court grant this Petition.

Respectfully submitted,

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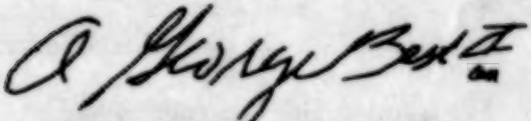

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